FEB 28 2011

No. 10-962

IN THE
Supreme Court of the United States

ALASKA AIRLINES, INC.,
Petitioner,

v.

AZZA EID, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF PROFESSORS PAUL DEMPSEY AND PABLO MENDES DE LEON IN SUPPORT OF PETITIONER

ELAINE J. GOLDENBERG
Counsel of Record
JOSHUA M. SEGAL
LESLIE POPE*
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6000
egoldenberg@jenner.com

**Admitted only in Virginia; supervised by principals of the Firm*

February 28, 2011

TABLE OF CONTENTS

INTERESTS OF AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The History Of The Tokyo Convention Demonstrates That It Should Be Interpreted To Empower Aircraft Commanders To Make Split-Second Decisions To Protect Passengers And Crew From Potential Hijackers And Unruly Passengers. 3

II. The Ninth Circuit's Ruling Improperly Deters Aircraft Commanders From Acting Swiftly To Protect Passengers From Potential Hijackers Or Other Dangers. 10

III. The Ninth Circuit's Ruling Inappropriately Creates A Discrepancy Between The Authority Of The Commanders Of International And Domestic Flights. 15

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Al-Qudhai'een v. America West Airlines, Inc., 267 F. Supp. 2d 841 (S.D. Ohio 2003) 19

Al-Watan v. American Airlines, Inc., 658 F. Supp. 2d 816 (E.D. Mich. 2009) 19

Bearden v. United States, 304 F.2d 532 (5th Cir. 1962), *judgment vacated*, 372 U.S. 252 (1963) 5, 6

Cerqueira v. American Airlines, Inc., 520 F.3d 1 (1st Cir. 2008) 19

Christel v. AMR Corp., 222 F. Supp. 2d 335 (E.D.N.Y. 2002) 19

Dasrath v. Continental Airlines, Inc., 467 F. Supp. 2d 431 (D.N.J. 2006) 19

Hammond v. Northwest Airlines, No. 09-12331, 2010 WL 2836899 (E.D. Mich. July 19, 2010) 19

Newman v. American Airlines, Inc., 176 F.3d 1128 (9th Cir. 1999) 17

Ruta v. Delta Airlines, Inc., 322 F. Supp. 2d 391 (S.D.N.Y. 2004) 19

United States v. Cordova, 89 F. Supp. 298 (E.D.N.Y. 1950) 6

Williams v. Trans World Airlines, 509 F.2d 942 (2d Cir. 1975) 19

Zervigon v. Piedmont Aviation, Inc., 558 F. Supp. 1305 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 1433 (2d Cir. 1983) (unpublished table decision) 19-20

STATUTES

49 U.S.C. § 1511(a) (1964) 7, 16

49 U.S.C. § 44902(b) 15

Pub. L. No. 85-726, § 101(4), 72 Stat. 731 (1958) (codified at 49 U.S.C. § 1472) 16

Pub. L. No. 87-197, § 1111, 75 Stat. 466 (1961) (codified at 49 U.S.C. § 1511) 6, 17

Pub. L. No. 103-272, § 1(e), 108 Stat. 1204 (1994) 7

LEGISLATIVE MATERIALS

Convention on Offenses Committed on Board Aircraft, Committee on Foreign Relations, S. Exec. Rep. No. 3, 91st Cong. (1969) 8, 9, 21, 22

Crimes Aboard Aircrafts in Air Commerce: Hearing Before the Aviation S. Subcomm. of the S. Comm. on Commerce, 87th Cong. (1961) 17, 18

Crimes on Board Aircraft: Hearings before the H. Subcomm. On Interstate and Foreign Commerce, 87th Cong. (1961) 19

H.R. Rep. No. 87-958 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2563 ..... 6, 17

H.R. Rep. No. 103-180 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818 7

S. Rep. No. 87-694 (1961) 6

S. Rep. No. 91-1083 (1970), *reprinted in* U.S.C.C.A.N. 3996 ..... 9, 11, 21

OTHER AUTHORITIES

Robert P. Boyle & Roy Pulsifer, *The Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft*, 30 J. Air. L. & Comm. 305 (1964) 2, 8

Paul Stephen Dempsey, *Aerial Piracy and Terrorism: Unilateral and Multilateral Responses to Aircraft Hijackings*, 2 Conn. J. Int'l. L. 427 (1987) 4

Stephen Dempsey, *Aviation Security: The Role of Law in the War Against Terrorism*, 41 Colum. J. Transnat'l L. 649 (2002) 4, 12, 22

Alona Evans, *Aircraft Hijacking: Its Cause and Cure*, 63 Am. J. Int'l L. 695 (1969) 7

G.A. Res. 2551 (XXIV), 24 U.N. GAOR Supp. (No. 30) 1831st plen. mtg. at 108, U.N. Doc. A/7630 (Dec. 12, 1969) 4

2 Hijack Jetliner and Hold It 9 Hours Before They Are Captured, N.Y. Times (Aug. 4, 1961) 5

International Civil Aviation Organization, *Annual Report of the Council – 2009* (2010) 12, 14

Robert Lindsey, *U.S. Is Moving on Two Fronts in Effort to Halt Sharp Increase in Plane Hijacks*, N.Y. Times, Sept. 5, 1969 22

Allan I. Mendelsohn, *In-Flight Crime: The International and Domestic Picture Under the Tokyo Convention*, 53 Va. L. Rev. 509 (1967) 4, 5

Passenger Forces Airliner in Florida to Detour to Cuba, N.Y. Times, May 2, 1961 5

Passengers' Actions Thwart a Plan to Down a Jet, N.Y. Times, Dec. 27, 2009 12

Pilot Tells of Seizure, N.Y. Times, July 25, 1961 5

Planes Diverted After Troubles, N.Y. Times, Jan. 9, 2010 13

Transportation Research Board, *Special Report 270: Deterrence, Protection, and Preparation: The New Transportation Security Imperative* (2002) 12

Richard Witkin, *Jetliner Seized, Flown to Havana*, N.Y. Times, Aug. 10, 1961 6

Richard Witkin, *To Combat Air Piracy*, N.Y. Times, Aug. 13, 1961 7

U.S. Ratifies Pact of 1963, N.Y. Times, Sept. 6, 1969 9

U.S. Plane Seized, Flown to Havana, N.Y. Times, July 25, 1961 5

INTERESTS OF AMICI[1]

Professor Paul Dempsey is the Director of the Institute of Air and Space Law and Tomlinson Professor of Law in Global Governance in Air and Space Law at McGill University. From 1979 to 2002 he edited the *Transportation Law Journal*, and he has served on the editorial board of *The Aviation Quarterly*. Professor Dempsey has written extensively about international aviation law and, in particular, the Tokyo Convention. He has addressed the Convention in his book *Public International Air Law*, published in 2008, as well as in several articles. His latest book, published in 2010, is *Aviation Liability Law*.

Professor Pablo Mendes de Leon is the Director of the International Institute of Air and Space Law at the University of Leiden, The Netherlands, and President of the European Air Law Association. Professor Mendes de Leon has organized conferences on developments in international aviation law and has written numerous articles about aviation and space law.

In amici's view, the Ninth Circuit's adoption of a non-deferential, negligence-based standard for determining whether an aircraft captain had "reasonable grounds to believe" that his action was appropriate will, if left standing, discourage aircraft

---

[1] No party or counsel for a party authored any portion of this brief or contributed monetarily to its preparation. Counsel of record for all parties received notice of amici's intention to file this brief more than ten days before it was due, and all parties have consented to its filing.

commanders from acting swiftly and decisively to ensure the safety of their aircraft and passengers in response to reports they receive from the cabin crew. The Ninth Circuit's holding contravenes the manifest intent of the drafters of the Tokyo Convention and of the United States Senate that ratified the Convention in 1969. In particular, the Ninth Circuit's holding undercuts the Tokyo Convention's principal purpose: to enhance safety aboard commercial aircraft. Amici urge this Court to grant the petition for certiorari and reaffirm the Nation's commitment to international aviation security.

SUMMARY OF ARGUMENT

The "principal purpose" of the Tokyo Convention of 1963 was the "enhancement of safety" aboard aircraft. Robert P. Boyle & Roy Pulsifer, *The Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft*, 30 J. Air. L. & Comm. 305, 321 (1964). To encourage aircraft commanders to act swiftly and decisively when confronted with potential security threats, the Convention authorizes the commander of an international flight to take "reasonable measures including restraint" when he "has reasonable grounds to believe" that a passenger "committed, or is about to commit" a criminal offense or an act that jeopardizes the safety of the aircraft or good order and discipline on board. Article 6(1) (Pet. App. 100a). The Tokyo Convention further provides that the aircraft commander, the crew, assisting passengers, and the aircraft owner or operation may not be held criminally or civilly liable for any action

"taken in accordance with" the Convention. Article 10 (Pet. App. 103a).

In the decision below, the Ninth Circuit held that the commander of an international flight must independently investigate the existence and scope of a disruption in the cabin in order to act on "reasonable grounds" and thereby be entitled to immunity under the Convention. This ruling is at odds with the historical context of the Convention's drafting and ratification. If allowed to stand, it threatens to undermine the Convention's efforts to enhance aviation security, by discouraging aircraft commanders from making critical, split-second decisions on the basis of reports received from the cabin crew. And it creates an implausible disjuncture with the statutory provision governing similar decisions made by airline personnel on domestic flights. This Court's review is warranted.

ARGUMENT

I. The History Of The Tokyo Convention Demonstrates That It Should Be Interpreted To Empower Aircraft Commanders To Make Split-Second Decisions To Protect Passengers And Crew From Potential Hijackers And Unruly Passengers.

The Tokyo Convention was drafted and ratified against the backdrop of a wave of hijackings and in-flight passenger disturbances. When the Convention was first conceived by the International Civil Aviation Organization's legal committee in the 1950s under the broad heading "The Legal Status of Aircraft," hijackings were still a relatively new, yet

troubling phenomenon; the first hijacking of a commercial aircraft had taken place in 1948. Paul Stephen Dempsey, *Aviation Security: The Role of Law in the War Against Terrorism*, 41 Colum. J. Transnat'l L. 649, 654 (2002); Paul Stephen Dempsey, *Aerial Piracy and Terrorism: Unilateral and Multilateral Responses to Aircraft Hijackings*, 2 Conn. J. Int'l. L. 427, 429 (1987).

By the time the United States Senate ratified the Convention on May 12, 1969, the plague of airline hijackings had only worsened. Not only was the number of hijackings worldwide increasing at an alarming rate, but hijacking had become a significant problem in the United States. There had been sixteen hijackings between 1961 and 1967 and, in 1968 alone, there had been thirty successful hijackings – seventeen of United States planes. Dempsey, *Aviation Security*, at 654. Eighty-seven planes would be hijacked in 1969, more than double the number of aircraft that had been hijacked in the previous two decades, *id.* at 655 n.23, and the United Nations General Assembly would characterize hijacking as an international crime for the first time. G.A. Res. 2551 (XXIV), 24 U.N. GAOR Supp. (No. 30) 1831st plen. mtg. at 108, U.N. Doc. A/7630 (Dec. 12, 1969).

In the United States, the watershed year was 1961. As of January 1961, no United States plane had ever been hijacked; by September of that year, four United States planes had been hijacked and one crew member had been attacked by a violent passenger. *See generally* Allan I. Mendelsohn, *In-*

Flight Crime: The International and Domestic Picture Under the Tokyo Convention, 53 Va. L. Rev. 509, 532 (1967). On May 1, a passenger on a Miami-Key West flight entered the cockpit, pulled out a knife and pistol, and demanded that the captain reroute the flight to Havana. *Passenger Forces Airliner in Florida to Detour to Cuba*, N.Y. Times, May 2, 1961, at 1. On July 8, an intoxicated passenger on a Chicago-Los Angeles flight, carrying a 7-inch knife, threatened to kill the captain and assaulted a stewardess. Mendelsohn, 53 Va. L. Rev. at 532. The flight crew was able to restrain him only by tying him to his seat. *See id.* Less than three weeks later, on July 24, a passenger on an Eastern Airlines Miami-Tampa flight entered the cockpit, pulled out a gun, and forced the captain to fly to the plane to Cuba. *U.S. Plane Seized, Flown to Havana*, N.Y. Times, July 25, 1961, at 1; *Pilot Tells of Seizure*, N.Y. Times, July 25, 1961. Then, on August 3, two passengers brandishing pistols ordered the captain of a Los Angeles-Houston flight to make a forty-five degree right turn and announced that they intended to divert the aircraft and its passengers to Mexico and then to Cuba. After the plane stopped as scheduled in El Paso to refuel, police prevented it from taking off again by firing into the plane's tires and engine and arrested the hijackers. *2 Hijack Jetliner and Hold It 9 Hours*, N.Y. Times, Aug. 4, 1961; *Bearden v. United States*, 304 F.2d 532 (5th Cir. 1962), *judgment vacated*, 372 U.S. 252 (1963). One week later, a passenger hijacked a Pan American Mexico City-Guatemala flight with 81 people aboard and forced the captain to fly the plane

to Cuba. Richard Witkin, *Jetliner Seized, Flown to Havana*, N.Y. Times, Aug. 10, 1961, at 1.

Congress reacted swiftly to this wave of hijackings by introducing legislation to prevent hijacking and punish hijackers.[2] S. Rep. No. 87-694, at 2 (1961) ("Recent incidents have focused, and forcefully so, attention on the need for additional laws covering crimes committed aboard commercial and private aircraft."); H.R. Rep. No. 87-958, at 1 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2563, 2563 ("Recent events have demonstrated the urgent need for stronger Federal laws applicable to criminal acts committed aboard commercial and private aircraft."). By September 1961, Congress had amended the Federal Aviation Act to make hijacking and interference with crew members federal crimes. Pub. L. No. 87-197, 75 Stat. 466 (Sept. 5, 1961). Under the new law, hijacking carried a minimum sentence of twenty years and a maximum sentence of death. *Id.* In addition – and importantly, for present purposes – Congress authorized air carriers to "refuse transportation to a passenger . . . when, in the opinion of the air carrier, such transportation would or might be inimical to safety of flight." *Id.* (codified first at 49 U.S.C. § 1511(a), then at 49

---

[2] Before 1961, no United States statute specifically outlawed hijacking *See Bearden*, 304 F 2d at 533 (hijacker charged with kidnapping and obstruction of commerce); *see also United States v. Cordova*, 89 F. Supp. 298 (E.D.N Y. 1950) (passenger who assaulted captain and stewardess went unpunished because court lacked jurisdiction).

U.S.C. § 44902(b)).[3] The Federal Aviation Administration, for its part, responded by creating an elite corps of air marshals, who carried firearms and were trained in judo. *See* Alona E. Evans, *Aircraft Hijacking: Its Cause and Cure*, 63 Am. J. Int'l L. 695, 704 (1969).

Consistent with the increasing domestic anxiety about hijacking, the United States pressed the international community to adopt vigorous anti-hijacking measures. In 1961, President Kennedy urged other countries to "use their maximum influence to discourage" hijackings and assured the public that the United States would "take every means . . . to prevent – not only the hijacking of our planes – but the hijacking of other planes." Richard Witkin, *To Combat Air Piracy*, N.Y. Times, Aug. 13, 1961.

---

[3] In 1994, 49 U.S.C. § 1511(a) was moved to 49 U.S.C. § 44902(b) and revised "without substantive change." Pub. L. No. 103-272, § 1(e), 108 Stat. 725, 1204 (1994). Section 1511(a) read: "Subject to reasonable rules and regulations prescribed by the Administrator, any air carrier is authorized to refuse transportation to a passenger or to refuse to transport property when, in the opinion of the air carrier, such transportation would or might be inimical to safety of flight." 49 U.S.C. § 1511(a) (1964). Today, 49 U.S.C. § 44902(b) reads: "Subject to regulations of the Under Secretary, an air carrier, intrastate air carrier, or foreign carrier may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety." The House report on the statutory revision confirmed that the purpose of the various linguistic changes was merely to eliminate unnecessary words. H.R. Rep. No. 103-180, at 1 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 818-19.

In the months leading up to the Tokyo Convention, the United States proposed an article to specifically address hijacking. Boyle & Pulsifer, *Tokyo Convention*, at 325. The United States explained that its proposal was motivated by "the rash of hijacking incidents . . . in quick succession in 1961." *Id.* (internal quotation marks omitted). At the Convention, the United States advocated for this proposal, which ultimately became Article 11. *Id.* at 354-55. As the chief of the United States delegation explained, a central aim of the Convention was to provide an aircraft commander with "the necessary authority to deal with persons who have committed, or are about to commit, a crime or an act jeopardizing safety on board his aircraft through use of reasonable force where required, and without fear of subsequent retaliation through civil suit or otherwise." *Id.* at 329. The drafters recognized that second-guessing commanders' split-second decisions to secure the safety of the aircraft, passengers, and crew would discourage them from taking early action to prevent a full-blown crisis for fear of making a mistake and being held liable after the fact.

Likewise, when the Tokyo Convention was submitted to the Senate for ratification in 1968, it was promoted as addressing aspects of the hijacking epidemic. *See, e.g.*, Convention on Offenses Committed on Board Aircraft, Committee on Foreign Relations, S. Exec. Rep. No. 3, 91st Cong., at 8 (1969) ("S. Exec. Rep.") (testimony of Murray J. Bellman, Deputy Legal Advisor, Department of State). The Convention was perceived as "an important step to achieving an urgently needed international

agreement for the effective control of aircraft hijacking." *Id.* at 12 (testimony of Charles H. Ruby, President of the International Airline Pilots Association); *U.S. Ratifies Pact of 1963*, N.Y. Times, Sept. 6, 1969 ("American aviation leaders and Government officials have hailed the treaty as an important first step in curbing hijacking."). Two years later, the Senate report on legislation implementing the Convention noted that the United States had "continued to press efforts to gain widespread international acceptance of the Tokyo Convention and to promote *other efforts to deter and resolve hijackings*." S. Rep. No. 91-1083 (1970), *reprinted in* U.S.C.C.A.N. 3996, 3998 (emphasis added).

Thus, the Tokyo Convention was developed to address the in-flight violence and criminal offenses, chief among them hijackings, plaguing international air travel in the 1960s. Given the gravity and the urgency of the problem at that time, it is unsurprising that the international community and the United States Senate were eager to grant aircraft commanders broad discretion to protect the safety of their aircraft and passengers.

The drafters of the Tokyo Convention did not anticipate that United States courts would graft a common-law negligence standard onto their agreement. Rather, the drafters decided that an aircraft commander's actions should be reviewed deferentially. They repeatedly rejected proposals that would have limited an aircraft commander's authority. For instance, the drafters rejected a

proposal that an aircraft commander should have "serious grounds" rather than "reasonable grounds" for taking action. Pet. App. 50a (Otero, J., dissenting) (citing International Civil Aviation Organization, *Minutes, International Conference on Air Laws, Tokyo, Aug.-Sept. 1963*, Doc. 8565-LC.152-1, at 155).

The drafters had every reason to believe that that United States courts would review aircraft commanders' decisions deferentially. During the drafting process, the United States delegate opined that in the United States the phrase "reasonable grounds" would be interpreted to mean that an aircraft commander would need a "substantial basis" for his belief and could "could not act arbitrarily and capriciously." *Id.* (citing International Civil Aviation Organization, *Minutes, International Conference on Air Laws, Tokyo, Aug.-Sept. 1963*, Doc. 8565-LC.152-1, at 155). Accordingly, in adopting the phrase "reasonable grounds," the drafters of the Tokyo Convention believed that they had granted all aircraft commanders – including those flying to and from the United States – broad discretion to protect the safety of their aircraft and passengers.

II. The Ninth Circuit's Ruling Improperly Deters Aircraft Commanders From Acting Swiftly To Protect Passengers From Potential Hijackers Or Other Dangers.

The Ninth Circuit's ruling represents a dangerous departure from the Tokyo Convention's commitment to aircraft commanders' broad authority to protect the safety of aircraft and passengers. Article 6 of the

Tokyo Convention not only grants the aircraft commander the authority to take "reasonable measures including restraint" when he reasonably believes that a passenger is about to endanger the safety of the aircraft and its passengers or disturb good order and discipline on board (or that the passenger has already done so), but also permits the aircraft commander to "authorize" crew members and passengers to assist him in restraining "any person whom he is entitled to restrain." Article 6(1) & (2) (Pet. App. 100a). Furthermore, pursuant to Article 8, the aircraft commander may disembark "any person who he has resonable grounds to believe has committed, or is about to commit, on board the aircraft" an act that may or does jeopardize the safety of the aircraft and its passengers or good order and discipline. Article 8 (Pet. App. 102a).

The Tokyo Convention protects aircraft commanders against criminal or civil liability for taking the swift, decisive action to protect aircraft and passengers contemplated by Articles 6 and 8. Article 10 provides that an aircraft commander who acts "in accordance with" the Tokyo Convention may not be held liable "in any proceeding." Article 10 (Pet. App. 103a). This Article was included to encourage aircraft commanders to adopt the "attitudes and actions" necessary to ensure the safety of their aircraft, passengers, and crew. S. Rep. 91-1083, at 2, *reprinted in* 1970 U.S.C.C.A.N. at 3997.

The security concerns that originally animated these provisions are just as pressing today, if not

more so. Commercial aircraft have been the target of hijackings, bombings, and other forms of aerial terrorism every year for more than five decades. Dempsey, *Aviation Security*, at 649; Transportation Research Board, *Special Report 270: Deterrence, Protection, and Preparation: The New Transportation Security Imperative* 2 (2002). And the attacks of September 11, 2001 – the day on which more people lost their lives to aerial terrorism than any other day in the history of aviation – are a powerful reminder of the destructive potential of hijackings, bombings, and in-flight attacks. Dempsey, *Aviation Security*, at 665.

The screening equipment and watch lists introduced after the September 11 attacks have undoubtedly kept many would-be hijackers and bombers from boarding commercial aircraft. But hijackers and bombers still manage to enter airports and board airplanes, and every year innocent travelers lose their lives to terrorism in the air. International Civil Aviation Organization, *Annual Report of the Council – 2009*, Appendix 1, at 12 (2010). In 2009 alone, there were twenty-three instances of unlawful interference with commercial aviation, including eight successful or attempted hijackings, one airport attack, one in-flight attack, and two cases of attempted sabotage. *Id.* at 10. Because even the most sophisticated screening techniques are not free of flaws, captains, crews, and passengers are a critical last line of defense against hijackings, bombings, and other in-flight dangers.

For instance, when a passenger aboard a 2009 Christmas Day flight from Amsterdam to Detroit attempted to ignite incendiary powder strapped to his leg, it was passengers and crew who doused the flames with water and handcuffed the would-be bomber. *Passengers' Actions Thwart a Plan to Down a Jet*, N.Y. Times, Dec. 27, 2009. In that case, of course, there was no possibility of mistake – a raging fire made the threat obvious. But the Tokyo Convention encourages captains to act *before* a threat materializes, when the would-be hijacker or would-be bomber is on the verge of acting. An aircraft commander is authorized to take action when he has reasonable grounds to believe the passenger "is about to commit" an act that might jeopardize "good order and discipline." Tokyo Convention, Article 6(1) (Pet. App. 100a). In this case, the aircraft commander might have prevented the would-be bomber, Umar Farouk Abdulmutallab, from igniting the powder. Indeed, several other passengers noticed that Abdulmutallab spent nearly a half hour in the plane's restroom before attempting to ignite the powder.[4]

---

[4] A few weeks after Abdulmutallab's attempted bombing, the captain of an AirTran Atlanta-San Francisco flight diverted the plane to Colorado Springs because a passenger, who had previously refused to follow crew member instructions, locked himself in a bathroom. On the ground, the plane was searched by law enforcement authorities, and it soon continued on to San Francisco. It was determined that the suspicious passenger was simply intoxicated. *Planes Diverted After Troubles*, N.Y. Times, Jan. 9, 2010. As the drafters of the Tokyo Convention recognized, the vigilance of captains, crews, and passengers will, and should be expected to, result in honest mistakes. *See*

The Ninth Circuit's ruling undermines the ability of an aircraft commander to respond appropriately to this kind of threat, and, if allowed to stand, will adversely affect the safety of international travelers worldwide. Twenty-eight percent of the 2.3 billion people who travel on commercial airlines each year – roughly 638.4 million people – travel on United States airlines. International Civil Aviation Organization, *Annual Report of the Council – 2009*, at 7-8. In response to the Ninth Circuit's decision, all United States airlines can be expected to modify their security policies to avoid liability; these modified policies will likely discourage aircraft commanders from acting swiftly based on information they receive from the cabin crew. Indeed, because FAA regulations prohibit an aircraft commander from leaving the cockpit during a time of potential disturbance in the cabin, policies that require an aircraft commander to conduct an independent investigation may prevent the commander from taking any action at all. *See* Pet. App. 131a (citing FAA Crew Training Manual, Common Strategy for Hijack). It would be challenging, if not impossible, for a aircraft commander, sitting in the cockpit, to listen to the plaintiff's "side of the story," "find out for himself" whether passengers or crew members were at fault for a disturbance, or confirm that a passenger had committed a serious offense. Pet. App. 24a, 27a. And even if such an extensive inquiry into a disturbance in the cabin could be conducted from the

---

infra pp 17-20 (discussing how "honest mistakes" are treated under 49 U.S.C § 44902(b), which governs domestic flights).

cockpit, it would require the aircraft commander to invest valuable time in investigating the disturbance rather than reacting to it.

In this case, had the aircraft commander paused to investigate the situation in the cabin, rather than making a split-second decision to make an emergency landing in Reno, his options thereafter would have been severely curtailed; "any hesitation" would have made it "impracticable" to make that emergency landing. Pet. App. 65a (Otero, J., dissenting). Yet in the Ninth Circuit's view, it was negligent for the commander not to leave the controls of the aircraft and peer through the door to find out more about what was going on in the first-class cabin. The Ninth Circuit's ruling suggests that a reasonable aircraft commander might have ignored two distress calls from his crew, shouting from the cabin, and a disruption the likes of which he had never experienced during his entire 26-year career. Pet. App. 37a n.2. That sort of tepid response to potential threats is exactly what the Tokyo Convention sought to avoid.

III. The Ninth Circuit's Ruling Inappropriately Creates A Discrepancy Between The Authority Of The Commanders Of International And Domestic Flights.

Besides ignoring the Tokyo Convention's history and undermining aviation security measures, the Ninth Circuit's decision creates a serious disjuncture between Article 10 of the Tokyo Convention and its domestic counterpart, 49 U.S.C. § 44902(b). Section 44902(b) provides that, with respect to domestic

flights, "an air carrier, intrastate air carrier, or foreign air carrier may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety." Similarly, the predecessor to that provision, 49 U.S.C. § 1511(a), provided that "any air carrier is authorized to refuse transportation to a passenger or to refuse to transport property when, in the opinion of the air carrier, such transportation would or might be inimical to safety of flight."[5] Both the history of § 44902(b) and its prevailing interpretation confirm the need for this Court's review of the Ninth Circuit's approach to the Tokyo Convention.

1. The history of § 44902(b) (and its predecessor, 49 U.S.C. § 1511(a)) confirms that the Ninth Circuit's approach is insufficiently deferential to decisions made by an aircraft's crew. Congress enacted § 1511(a) in 1961, granting air carriers broad discretion to refuse transportation to anyone who "in the opinion of the air carrier . . . would or might be inimical to safety of flight." 49 U.S.C. § 1511(a) (1964). As an amendment to the Federal Aviation Act of 1958, § 1511(a) governed all flights commencing or terminating in the United States. *See* Pub. L. No. 85-726, § 101(4), 72 Stat. 731, 737 (1958) (codified at 49 U.S.C. § 1472) (defining "[a]ir commerce" as any "operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly

---

[5] As noted above, the replacement of § 1511(a) with § 44902(b) was not intended to effect any substantive change, and certain language was revised merely to eliminate unnecessary words *See supra* note 3

affects, or which may endanger safety in, interstate, overseas, or foreign air commerce"); Pub. L. No. 87-197, § 1111, 75 Stat. 466, 467-68 (1961) (codified at 49 U.S.C. § 1511); H.R. Rep. 87-958, at 2, *reprinted in* 1961 U.S.C.C.A.N. at 2564 (explaining that the 1961 amendments to the 1958 Federal Aviation Act would be applicable to foreign and domestic aircraft "engaged in flights originating at or destined to points in the United States."). Once the Tokyo Convention took effect, the Convention's provisions (rather than § 1511(a)) began to govern international flights, but § 1511(a) continued to govern flights entirely within the United States. *See, e.g., Newman v. Am. Airlines, Inc.*, 176 F.3d 1128 (9th Cir. 1999).

The legislative history indicates that § 1511(a) was intended to vigorously protect carriers' right to exclude any passenger who might pose a threat to safety aboard the aircraft – from a would-be terrorist to an intoxicated movie star – and to protect carriers from incurring liability for "honest mistakes." *See Crimes Aboard Aircrafts in Air Commerce: Hearing Before the Aviation S. Subcomm. of the S. Comm. on Commerce*, 87th Cong., at 48 (1961) (statement of Stuart Tipton, President, Air Transport Ass'n). Section 1511(a) was inserted into the 1961 legislation (styled as an amendment to the 1958 Federal Aviation Act) after a hearing of the Aviation Subcommittee of the Senate Committee on Commerce. In that hearing – which took place just hours after an attempted hijacking – Stuart Tipton, president of the Air Transport Association, raised the issue of carrier liability. Senator Engle, who had introduced the legislation, asked Tipton whether

airlines were presently able to refuse suspicious passengers. *Id.* (testimony of Stuart Tipton). Tipton answered that, as common carriers, airlines were "bound to carry those that present themselves up to the extent of their capacity" and, consequently, that it was "unfortunately quite clear" that an airline that refused a suspicious passenger risked civil liability. *Id.*

Senator Monroney, who had been a sponsor of the 1958 Act, was evidently troubled by this answer. He asked whether it would help the airlines screen out dangerous and unruly passengers if language were written into the bill restating "the right" of the airline to refuse to transport a ticketed passenger "on grounds of security." *Id.* As envisioned by Senator Monroney, whether a particular passenger posed a threat would be determined by "the judgment of the carrier alone," so that the carrier would not have to prove that a passenger was a safety hazard. *Id.* Tipton responded that such a provision "would help a great deal," and that it was "important" that the determination whether a particular passenger posed a threat be entrusted to "the judgment of the air carrier, or its employees" in order to give carriers "protection against a mistake." *Id.* As Tipton put it, "there may well be mistakes." *Id.* Senator Monroney agreed that carriers should not be liable for "honest mistake[s]." *Id.*[6] The need to insulate carriers from

---

[6] To similar effect, he observed that the provision under discussion not only would embolden carriers to scrutinize and reject passengers who might pose a security threat, but also would protect carriers from frivolous lawsuits brought by passengers turned away for being intoxicated *Id.*; *see also*

liability for honest mistakes is consistent with a high degree of deference to airline personnel's safety-related decisions, not with the negligence-based standard embodied by the Ninth Circuit's interpretation of the Tokyo Convention.

2. The scope of carriers' discretion under § 1511(a) was not litigated before the Tokyo Convention took effect. But a raft of decisions spanning the last four decades have interpreted § 1511(a) and § 44902(b) to mandate a deferential standard when courts review airline personnel's safety-related decisions. In particular, the First and Second Circuits review the decision of a domestic flight's aircraft commander under a highly deferential "arbitrary and capricious" standard. *See, e.g., Cerqueira v. American Airlines, Inc.*, 520 F.3d 1, 14 (1st Cir. 2008); *Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975). The same is true of many district courts. *See, e.g., Hammond v. Northwest Airlines*, No. 09-12331, 2010 WL 2836899, at 4 (E.D. Mich. July 19, 2010); *Al-Watan v. American Airlines, Inc.*, 658 F. Supp. 2d 816, 822 (E.D. Mich. 2009); *Dasrath v. Continental Airlines, Inc.*, 467 F. Supp. 2d 431, 443-44 (D.N.J. 2006); *Ruta v. Delta Airlines, Inc.*, 322 F. Supp. 2d 391, 397 (S.D.N.Y. 2004); *Al-Qudhai'een v. America West Airlines, Inc.*, 267 F. Supp. 2d 841, 846 (S.D. Ohio 2003); *Christel v. AMR Corp.*, 222 F. Supp 2d 335, 340-41 (E.D.N.Y. 2002); *Zervigon v. Piedmont*

Crimes on Board Aircraft: Hearings before the H. Subcomm On Interstate and Foreign Commerce, 87th Cong , at 63-65 (1961) (testimony of Stuart Tipton)

Aviation, Inc., 558 F. Supp. 1305, 1306 & n.7 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 1433 (2d Cir. 1983) (unpublished table decision).

3. The legislative and interpretive history of § 44902(b) (formerly § 1511(a)) thus establish that, under this provision, airline personnel making safety decisions on domestic flights receive the benefit of a highly deferential standard and are insulated from liability for "honest mistakes." Viewed in this light, the Ninth Circuit's crabbed interpretation of the Tokyo Convention becomes even more starkly anomalous.

First, if allowed to stand, the decision below will create an illogical disjuncture between an aircraft commander's authority when he flies domestically and when he flies internationally. The commander of a Los Angeles-Tokyo flight will have less discretion to protect the safety of his aircraft and its passengers than will the commander of a Los Angeles-New York flight. What is more, the disparity will exist even when both planes are on the ground at LAX: an aircraft commander's authority under the Tokyo Convention takes effect "the moment when all external doors are closed" and continues "until the moment when any such door is opened for disembarkation." Article 5(2) (Pet. App. 99a-100a). The Senate that ratified the Tokyo Convention surely did not have in mind these anomalous results.

To the contrary, the record suggests that the Senate anticipated that the Tokyo Convention would *prevent* the scope of American aircraft commanders'

authority from varying in accordance with their flight path. President Johnson encouraged the Senate to ratify the Convention to ensure that an American captain crossing international borders would not "find himself the subject of a criminal or civil proceeding for an action which he had taken in attempting to prevent the commission of an offense on board his aircraft." Pet. at 5 (citing S. Exec. Doc. No. 90-L, at VI (1968)). Likewise, State Department representatives testified that under the Tokyo Convention, "an aircraft commander would be empowered, if necessary, to restrain or to off load a passenger whose conduct threatened safety or good order and discipline" while being "free from risk of being prosecuted under varying or unknown laws of several jurisdictions." S. Exec. Rep. at 8 (testimony of Murray J. Bellman, Deputy Legal Advisor, Department of State). Finally, the Senate report accompanying the Convention's implementing legislation explained that the Convention "makes more certain the powers and authority of an aircraft commander and establishes a uniform international standard for judging the actions of the commander." S. Rep. No. 91-1083, at 2, *reprinted in* 1970 U.S.C.C.A.N. at 3997. Although the focus evidently was on creating uniformity when international boundaries are crossed, there is no reason to think uniformity was any less of a concern when it came to the standards applicable to domestic and international flights.

Second, as noted above, § 1511(a) governed safety-related decisions on international flights from 1961 until the Tokyo Convention's ratification in

1969. Thus, by adopting a standard less deferential than that of § 1511(a) (now § 44902(b)), the decision below suggests that when the United States ratified the Tokyo Convention in 1969, it actually *reduced* the amount of discretion given to airline personnel.

That makes no sense. By 1969, the broad protections of § 1511(a) had been in place for nearly a decade, but hijackings had *increased* in frequency. In the previous year alone, seventeen United States planes had been hijacked. Dempsey, *Aviation Security*, at 655. The International Airline Pilots Association and the Air Transport Association, frustrated that many hijackers were escaping unpunished, had offered a $25,000 reward for any information leading to a hijacker's arrest and conviction. S. Exec. Rep. at 12. And the International Airline Pilots Association was threatening to call a one-day worldwide pilots' strike to force nations to "get off the dime and do something about hijacking." Robert Lindsey, *U.S. Is Moving on Two Fronts in Effort to Halt Sharp Increase in Plane Hijacks*, N.Y. Times, Sept. 5, 1969. In such a climate, it was hardly in the interests of the United States to *reduce* the authority of an American aircraft captain flying internationally.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ELAINE J. GOLDENBERG
Counsel of Record
JOSHUA M. SEGAL
LESLIE POPE*
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6000
egoldenberg@jenner.com

**Admitted only in Virginia; supervised by principals of the Firm.*